APPENDIX G

Not for Publication
No. 82-1899
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS HEALTH and WELFARE FUND, and JOHN E. DWYER,
Plaintiffs-Appellees,

v.

R-W SERVICE SYSTEM, INC.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed AUG 23, 1984

Before: KEITH and KRUPANSKY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

Per Curiam. R-W Service System, Inc. brings this interlocutory appeal from an order of the district court requiring it to make available to Plaintiffs certain records concerning all of its employees and other records it may have, or that are reasonably obtainable from third parties. For the reasons set forth below, we reverse the district court and remand for further proceedings not inconsistent with this opinion.

I

Plaintiffs-Appellees, the Central States Southeast and Southwest Areas Pension Fund, and Central States Southeast and Southwest Areas Health and Welfare Funds, (the Funds) are multiemployer-employee benefit trust funds established in accordance with Section 302 (c)(5) of the Labor

Management Relations Act of 1947, as amended. (29 U.S.C. §186(c) (5), LMRA). Both Funds are also subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*

Defendant-Appellant, R-W Service System, Inc. (R-W) is a trucking company, and a signatory to the National Master Freight Agreement and supplemental collective bargaining agreements with various local unions. The collective bargaining agreements require that R-W make payments to the Funds on behalf of employees covered by the collective bargaining agreement. ("Covered" employees). An employee is covered by the collective bargaining agreements if engaged in a job classification described in the Master Freight agreement or supplements. During all relevant times the collective bargaining agreements required specified weekly contributions on behalf of employees in the enumerated job classifications.

In 1978 Plaintiffs brought suit on behalf of their participants and beneficiaries to collect delinquent contributions, to compel R-W to produce certain records, and submit to an audit. The district court assumed jurisdiction under § 301 of the LMRA and § 502 of ERISA. Plaintiffs filed a motion for partial summary judgment to compel Defendant to provide various records and to submit to an audit.

At issue in the present appeal is an order of the district court of November 2, 1982 compelling defendant to "make personnel files and payroll data for *all* employees available to Plaintiffs." (emphasis in original). In addition, the district court ordered R-W to provide the Funds "with all records that it presently maintains, as set forth in the Magistrate's Report and Recommendation . . . [and] with all records to the extent that they are reasonable [*sic*] obtainable from third parties."[1]

[1] As set forth in the Magistrate's Report, the records subject to production included, *inter alia*, time cards or driver's logs, trip manifests, dispatch sheets, delivery receipts, bills of lading, freight bills, 941 F.I.C.A. Quarterly Returns.

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II

In concluding Plaintiffs were entitled to have access to personnel and payroll records for *all* employees of R-W, the district judge was guided by another opinion from the same district in a similar case, reaching the same conclusion. *Central States, et al. v. Central Transport*, 522 F.Supp. 658 (E.D. Mich. 1981). However, subsequent to the filing of the notice of appeal in the case at bar (but before filing of briefs) this Court reversed the district court in *Central Transport* in a well reasoned opinion authored by Judge Kennedy. *Central States, et al. v. Central Transport*, 698 F.2d 802 (6th Cir. 1983) *petition for cert.* granted, 52 U.S.L.W. 3902 (June 18, 1984). R-W contends that the decision of the district court in the case at bar must be reversed in light of this Court's decision in *Central Transport*. Plaintiffs seek to distinguish *Central Transport*. We are of the opinion that this Court's opinion in *Central Transport, supra*, 698 F.2d 802 is dispositive in the case at bar with respect to the authority of Plaintiffs to examine records of noncovered employees. In *Central Transport* this Court held that a trustee does not have a statutory or contractual right under ERISA or the trust agreement to audit records of all employees of the defendants' employees. 698 F.2d at 810. Under *Central Transport*, a trustee has the authority to inspect the employer's books and records "if they have reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement" but has not been classified as a covered employee. 698 F.2d at 810. (emphasis in original).

Plaintiffs have not suggested they have "reasonable cause" to believe that any *particular employee* is covered by collective bargaining but is not classified as a covered employee. The language of *Central Transport* is clear and Plaintiffs' attempts to distinguish the case are simply without merit. Accordingly, the decision of the district court must be reversed to the extent that it is inconsistent with the decision of this Court in *Central Transport*.

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III

Defendant R-W also contends it has no obligation to produce records from third parties as is required by the order of the district court.

The district court stated:

> This Court also recognizes the anomaly that, although Plaintiffs are entitled to an audit from 1969-76, Defendant denies having possession of any records which date back that far. For this reason, the Court directs Defendant to provide Plaintiffs with records that are within its actual possession, as well as those records which are within its contructive possession (to wit, third parties).

The order further provided, "Defendant will provide Plaintiffs with all records to the extent that they are reasonably obtainable from third parties."

The production of these records is for the purposes of enabling Plaintiffs to conduct the audit of R-W.

Federal Rule of Civil Procedure 34 provides that a party may request any other party to produce relevant documents "which are in the possession, custody or control of the party upon whom the request is served." "A party may not be compelled to produce papers or things which are not in his possession, custody, or control . . ." 4A J.Moore, *Moore's Federal Practice* ¶ 34.17 (2d ed. 1983 revision), (footnote omitted). 8 Wright & Miller, *Federal Practice & Procedure*, § 2210 (1970). "Inspection can be had if the party to whom the request is made has the legal right to obtain the document, even though in fact he has no copy." *Id.* (footnote omitted).

The district court's order construes those documents within the possession of third parties as within the "constructive possession" of R-W. The court does not address the possession, custody, or control question in particular,

with respect to each of the documents sought by Plaintiffs' from third parties. It is appropriate for the district court on remand to consider, on a case by case basis, whether the documents sought by Plaintiffs are subject to production by the Defendant, and to consider any contentions of Defendant that it has no obligation to produce particular documents. For this Court to address on a document by document basis this issue at this point in the proceedings is at best premature as these contentions have yet to be addressed by the district court.

IV

In accordance with the foregoing, the decision of the district court ordering the production of all of employees' records is reversed in light of this Court's decision in *Central States, et al v. Central Transport*, 698 F.2d 802 (6th Cir. 1983), and the case is remanded to the district court for further proceedings. The district court is authorized to defer action in the instant case until the Supreme Court has announced its decision in the above-cited case in which it has granted certiorari. No costs are taxed. The parties will bear their own costs on the present appeal.

APPENDIX H

**CENTRAL STATES
SOUTHEAST AND SOUTHWEST AREAS
HEALTH AND WELFARE FUND**

**1984 - SPECIAL BULLETIN - 84-8
HEALTH AND WELFARE FUND**

DATE: JULY, 1984

TO: ALL PARTICIPANTS, LOCAL UNIONS REPRESENTING PARTICIPANTS, AND CONTRIBUTING EMPLOYERS OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND

In order to better protect the Fund's financial integrity and its participants, the Trustees have revised the Fund's suspension of benefits policy and procedures. Commencing September 1, 1984, participants employed by an employer that is delinquent in its payment of required contributions to the Fund will be notified of their employer's delinquency on a monthly basis. The notification will also inform the participants that, if their employer does not pay the delinquent amount within thirty (30) days after the date of the notice, the Fund will suspend the processing of claims incurred by such participants and their covered family members after the 30-day notice period expires. If the employer does not pay the delinquent contributions within that 30-day notice period, claims filed for services or other benefits provided or other losses incurred after the 30-day notice period, will not be processed unless and until the required contributions have been received by the Fund.

Participants are encouraged to continue to submit their claims to the Fund while their employer is delinquent in making the required contribution payments even though the processing of such claims will be suspended until the Fund

receives the delinquent contributions. Once the employer has paid the required contributions, the Fund will process all eligible claims that were previously suspended for the period through which contributions have been received by the Fund.

Every month the Fund will send to each delinquent contributing employer a notice of its delinquent amount and will distribute to each local union a list of delinquent employers with which it has a contract requiring contributions.

If you have any questions regarding this policy, please contact the Participant Services Group at (800) 323-5000.

Sincerely,

BOARD OF TRUSTEES
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE FUND, by
(s) GEORGE W. LEHR
EXECUTIVE DIRECTOR